

91-770

(1)

Supreme Court, U.S.

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Case No. \_\_\_\_\_

UNITED STATES SUPREME COURT

1991 Term

JOSEPH C. KIRCHDORFER, INC.

Petitioner

v.

DONALD B. RICE, SECRETARY OF  
THE AIR FORCE,

Respondent

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On Writ of Certiorari  
to the United States Court of Appeals  
For the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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**I.**

**QUESTION PRESENTED FOR REVIEW**

1. WHETHER DENYING ADMISSABILITY OF EXCULPATORY EVIDENCE WHICH WAS CLEARLY ADMISSIBLE UNDER FEDERAL RULES OF EVIDENCE 803(24) WAS PATENT ERROR AND DENIAL OF DUE PROCESS.

## TABLE OF CONTENTS

|      |  |   |
|------|--|---|
| I.   | QUESTIONS PRESENTED FOR<br>REVIEW . . . . .  | 2 |
|      | TABLE OF AUTHORITIES . . . . .   | 3 |
| II.  | REPORTS AND OPINIONS OF THE<br>COURTS AND ADMINISTRATIVE<br>AGENCY BELOW . . . . . | 4 |
| III. | GROUND ON WHICH JURISDICTION<br>OF THE SUPREME COURT IS<br>INVOKED . . . . .       | 5 |
| IV.  | APPLICABLE CONSTITUTIONAL,<br>STATUTORY AND REGULATORY<br>PROVISIONS . . . . .     | 6 |
| V.   | STATEMENT OF CASE . . . . .  | 7 |
| VI.  | REASONS FOR ALLOWANCE OF THE<br>WRIT . . . . .                                     | 9 |

## TABLE OF AUTHORITIES

### Cases Cited:

|   |    |
|---|----|
| <u>Dallas County v. Commercial</u><br><u>Union Assurance Company,</u><br>286 F.2d 388 (5th Cir. 1961) . . . . | 11 |
|---|----|

### Statutes Cited:

|  |    |
|--|----|
| Federal Rules of Evidence<br>Rule 803(24). . . . . | .8 |
|--|----|

## II.

### REPORTS AND OPINIONS OF THE COURTS AND ADMINISTRATIVE AGENCY BELOW

1. Petition for Rehearing and Suggestion for Rehearing En Banc to the United States court of Appeals for the Federal Circuit denied September 17, 1991.
2. The opinion appealed to the United States Court of Appeals for the Federal Circuit: SKIP KIRCHDORFER, INC., V. DONALD B. RICE, SECRETARY OF THE AIR FORCE, Case No. 91-1151, Judgment Entered without Opinion on August 6, 1991.
3. Appeal is taken from an opinion by an Administrative Judge of the Armed Services Board of Contract Appeals: SKIP KIRCHDORFER, INC. ASBCA Nos. 32637 and 35074, Opinion Dated September 13, 1990.

### III.

#### GROUND~~S~~ ON WHICH JURISDICTION OF THE SUPREME COURT IS INVOKED.

Petitioners appeal from the decision of the United States Court of Appeals for the Federal Circuit entered August 6, 1991, affirming the decision rendered by the Armed Services Board of Contract Appeals, as identified above, entered September 13, 1990.

This Court has jurisdiction pursuant to 28 U.S.C. Section 1254(1).

#### IV.

#### APPLICABLE CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS.

1. Federal Rules of Evidence Rule  
803(24)



V.

STATEMENT OF CASE

This is a case where the Air Force defaulted Kirchdorfer on a multi-million dollar contract at Eglin Air Force Base, Florida. Default for termination is capital punishment to a government contractor since it terminates all existing contract rights and exposes the defaulted contractor to reprocurement costs.

Kirchdorder was performing work for the Air Force in renovating housing units when the government refused to accept Kirchdorfer's work. The government refused to tell Kirchdorfer why it was refusing its work. Kirchdorfer retained a retired Corps of Engineers inspector by the name of Mr. Vernon Davis to assist Kirchdorfer in reviewing the work and

having the work accepted by the Air Force.

Mr. Davis went to the job, prepared reports, made inspections and gave detailed documents showing how the work complied with the specifications. Kirchdorfer's work was such that the Air Force would have no choice but to accept the workmanship of Kirchdorfer. Two months after Mr. Davis was hired and prepared his reports the Department of the Air Force terminated Kirchdorfer's contract for default.

The matter was heard before the Armed Services Board of Contract Appeals in an Administrative Hearing. During the hearing Kirchdorfer tendered as exhibits the reports of Vernon Davis under the Federal Rules of Evidence Rule 803(24), Residual Hearsay Rule. The documents were tendered under this rule since Mr. Davis

had died in 1988, which was almost two and one-half years after the contract was terminated and one year prior to the trial. The contract had been reprocured in 1987 and the working conditions had changed at Eglin Air Force Base, making it impossible for Kirchdorfer to have any other expert critique the work as Mr. Davis had done in 1985. Kirchdorfer's only credible evidence were the reports of Vernon Davis which stated that Kirchdorfer's work complied with the specifications but the Board of Contract Appeals would not allow the evidence. The Court of Appeals for the Federal Circuit heard the case and affirmed the Board of Contract Appeals.

## **VI.**

### **REASONS FOR ALLOWANCE OF THE WRIT**

The Writ should be granted since the Circuits are split in their application

of the Residual Hearsay Rule as provided for by the Federal Rules of Evidence. The Federal Circuit by affirming the Board of Contract Appeals adopted a rule which is not contemplated by the Federal Rules of Evidence in considering whether to admit or to deny evidence. The Board of Contract Appeals and the Federal Circuit found that exculpatory evidence could not be admitted if the prejudice of the government is too severe. This is not a test under the Federal Rules of Evidence and no court other than the Court of Appeals for the Federal Circuit has adopted such a test.

The reports of Mr. Davis were critical, significant, material and irreplaceable and could not be replicated and were more probative than anything else Kirchdorfer had to support its case


that the termination for default was improper.

Kirchdorfer was unable to prove that it was existing conditions at the Air Force Base, and the fact that the government has defective specifications without the admissability of the Vernon Davis reports. The only Court of Appeals which has addressed this issue is Dallas County v. Commercial Union Assurance Company, 286 F.2d 388 (5th Cir. 1961). The Fifth Circuit as well as Moore's Federal Practice address the Residual Hearsay Rule in that the rule should be one of admissability following what is known as "a rule of necessity and reasonable efforts standard". The rule of necessity and reasonable efforts standard is such that the evidence would be admitted under the Residual Hearsay Rule when it can be shown that the

proponent made reasonable efforts to duplicate the evidence elsewhere. In this case, Kirchdorfer could not duplicate the evidence since Vernon Davis had died after the work had been completed and changed. The government put on no evidence that Kirchdorfer could duplicate the exculpatory evidence. Furthermore, the records of the government showed that due to hiring a new contractor and changing the work Kirchdorfer had no opportunity to produce new evidence showing that Kirchdorfer's work should not have been rejected.

The Court of Appeals for the Federal Circuit is a new circuit which provides for appeals for all Board of Contract Appeals cases. The Supreme Court needs to grant certiorari in this case in order to have a definitive ruling on the Residual Hearsay Rule and as to the

applicability of the Federal Rules of  
Evidence in these administrative  
hearings.

A handwritten signature in dark ink, appearing to read 'Laurence J. Zielke', written over a horizontal line.

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